

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

THOMAS CURTIS,

Plaintiff,

v.

PROGRESSIVE INS., et. al.,

Defendants.

3:20-cv-00700-MMD-CLB

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

Before the court is Plaintiff Thomas Curtis's, ("Curtis"), application to proceed *in forma pauperis* (ECF No. 1), and *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the court recommends that Curtis's *in forma pauperis* application (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be dismissed with prejudice.

**I. IN FORMA PAUPERIS APPLICATION**

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1. "[T]he

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<sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 supporting affidavit [must] state the facts as to [the] affiant's poverty with some particularity,  
 2 definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation  
 3 marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the benefits  
 4 of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 A review of the application to proceed IFP reveals Curtis cannot pay the filing fee;  
 6 therefore, the court recommends that the application (ECF No. 1) be granted.

## 7 **II. SCREENING STANDARD**

8 Prior to ordering service on any defendant, the Court is required to screen an *in forma*  
 9 *pauperis* complaint to determine whether dismissal is appropriate under certain  
 10 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28  
 11 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for  
 12 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*  
 13 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.  
 14 2015).

15 "[T]he court shall dismiss the case at any time if the court determines that – (A) the  
 16 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)  
 17 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against  
 18 a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

19 Dismissal of a complaint for failure to state a claim upon which relief may be granted  
 20 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)  
 21 tracks that language. When reviewing the adequacy of a complaint under this statute, the  
 22 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*  
 23 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a  
 24 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)  
 25 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a  
 26 claim."). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See  
 27 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The Court must accept as true the allegations, construe the pleadings in the light  
 2 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v.*  
 3 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints  
 4 are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v.*  
 5 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause  
 7 of actions," it must contain factual allegations sufficient to "raise a right to relief above the  
 8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading  
 9 must contain something more. . . than. . . a statement of facts that merely creates a suspicion  
 10 [of] a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a  
 11 minimum, a plaintiff should include "enough facts to state a claim to relief that is plausible  
 12 on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of  
 14 the complaint the action is frivolous and could not be amended to state a federal claim, or  
 15 the district court lacks subject matter jurisdiction over the action. *See Cato v. United States*,  
 16 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

### 17 **III. SCREENING OF COMPLAINT**

18 Curtis brings this action pursuant to 42 U.S.C. § 1983, against Defendants  
 19 Progressive Insurance ("Progressive") and Nguyet Nguyen ("Nguyen") for claims of  
 20 "obligation of contract," "product liability," "double treble damage," and "personal injury  
 21 liability." (ECF No. 1-1.) The complaint relates to a motor vehicle accident that occurred in  
 22 Las Vegas, Nevada in June 2019. (*Id.*) The bulk of the complaint seems to relate to a  
 23 dispute about the amount of money paid out by the driver of the vehicle—Nguyen's  
 24 insurance carrier, Progressive. (*Id.*) Curtis also alleges that the vehicle he was riding in had  
 25 no airbags and injuries were sustained as result of the accident. (*Id.*)

26 First, Curtis's factual allegations are conclusory, vague, and ambiguous. Dismissal  
 27 on those grounds alone is appropriate. Federal Rule of Civil Procedure 8(a)(2) requires that

1 a complaint contain “a short and plain statement of the claim showing that the pleader is  
2 entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the  
3 grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quotation and alteration omitted).  
4 Here, Curtis’s largely incomprehensible narrative makes it nearly impossible for the court to  
5 identify the factual or legal basis for his claims. Further, Curtis asserts little more than  
6 conclusory allegations that Progressive denied claims, but this does not provide the court  
7 with sufficient information to show Progressive acted in bad faith. These statements do not  
8 create a plausible claim for relief, but instead are a conclusory, unwarranted deduction of  
9 fact. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (A court is  
10 not required to accept as true allegations that are merely conclusory, unwarranted  
11 deductions of fact, or unreasonable inferences).

12 Additionally, 42 U.S.C. § 1983 aims “to deter state actors from using the badge of  
13 their authority to deprive individuals of their federally guaranteed rights.” *Anderson v.*  
14 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135,  
15 1139 (9th Cir. 2000)). The statute “provides a federal cause of action against any person  
16 who, acting under color of state law, deprives another of his federal rights[,]” *Conn v.*  
17 *Gabbert*, 526 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing  
18 substantive provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947  
19 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the  
20 violation of a federally-protected right by (2) a person or official who acts under the color of  
21 state law. *Anderson*, 451 F.3d at 1067.

22 A defendant has acted under color of state law where he or she has “exercised power  
23 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed  
24 with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *U.S. v.*  
25 *Classic*, 313 U.S. 299, 326 (1941)). Generally, private parties are not acting under color of  
26 state law. *See Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). “A private individual  
27 may be liable under § 1983 if she conspired or entered joint action with a state

1 actor.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir.2002). The plaintiff must show “an  
2 agreement or meeting of the minds to violate constitutional rights,” and “[t]o be liable, each  
3 participant in the conspiracy need not know the exact details of the plan, but each participant  
4 must at least share the common objective of the conspiracy.” *Id.* (internal quotation marks  
5 omitted).

6 Curtis’s only named defendants, Progressive and Nguyen, are private parties. Curtis  
7 does not allege that Progressive and Nguyen were acting under the color of state law when  
8 his rights were violated or that defendants conspired or entered joint action with a state  
9 actor. Because Curtis is suing private parties and does not assert that they acted under the  
10 color of state law, he cannot satisfy each of the required elements for relief under an § 1983  
11 action.

12 Accordingly, Curtis states no claim upon which relief may be granted, and given the  
13 vague nature of the allegations, amendment would be futile. *See Cato*, 70 F.3d at 1106.  
14 Therefore, it is recommended that the action be dismissed, with prejudice.

#### 15 **IV. CONCLUSION**

16 Consistent with the above, the court finds that dismissal is warranted under 28 U.S.C.  
17 § 1915(e)(2)(B)(ii). Because amendment would be futile, the dismissal should be with  
18 prejudice. *See Cato*, 70 F.3d at 1106.

19 The parties are advised:

20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
21 Practice, the parties may file specific written objections to this Report and Recommendation  
22 within fourteen days of receipt. These objections should be entitled “Objections to  
23 Magistrate Judge’s Report and Recommendation” and should be accompanied by points  
24 and authorities for consideration by the District Court.

25 2. This Report and Recommendation is not an appealable order and any notice  
26 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District  
27 Court’s judgment.

1 **V. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Curtis's application to proceed *in forma*  
3 *pauperis* (ECF No. 1) be **GRANTED**;

4 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** Curtis's complaint (ECF No.  
5 1-1); and,

6 **IT IS FURTHER RECOMMENDED** that the complaint (ECF No. 1-1) be **DISMISSED**  
7 **WITH PREJUDICE.**

8 **DATED:** January 28, 2021.

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10 **UNITED STATES MAGISTRATE JUDGE**  
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